

Late For Work: Nurse Has No FMLA Rights.

An RN with seventeen years on the job had had positive performance reviews, except for written reprimands for excessive absenteeism and tardiness. She had been informed that one more unexcused episode would result in termination.

She had a long history of vestibular migraines. Many times she had followed the hospital's procedure for requesting time off and was given time off, her right under the US Family and Medical Leave Act (FMLA). Those days off were not considered unexcused absences.

On the day in question she did not request time off beforehand or phone ahead, she simply showed up two minutes late and was fired.

The US Family and Medical Leave Act (FMLA) gives eligible employees the right to intermittent leave when they must miss work for a serious health condition.

However, the law does not excuse an employee from notifying the employer in advance of the employee's need for intermittent leave.

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
July 29, 2015

The US Court of Appeals for the Sixth Circuit (Michigan) agreed with the nurse that her vestibular migraines are a serious health condition for which she qualified for medical leave under the FMLA.

The Court also acknowledged that she had properly notified her employer about the existence of her condition and at other times in the past had properly obtained permission to miss work or report late.

However, her firing was justified for the day in question because the nurse was not exempt from the hospital's requirement that she follow the hospital's procedure for notifying the hospital in advance when her condition required her to take leave. ***Norton v. LTCH***, __ Fed. Appx. __, 2015 WL 4567221 (6th Cir., July 29, 2015).

Discrimination: Older RN Replaced With Younger LPN.

An RN was hired as resident services coordinator for the company's three nursing homes.

A year later she was informed she was being replaced with an LPN because the LPN's salary would be \$25,000 less than an RN with her level of experience.

The RN was then fifty-seven years old and the LPN thirty-eight.

The RN sued for age discrimination.

A fifty-seven year-old RN was replaced with a thirty-eight year-old LPN.

The only explanation given to the RN was cost saving.

The employer has the burden of proof to convince the Court that age discrimination was not the real reason for this decision.

UNITED STATES DISTRICT COURT
MISSISSIPPI
August 10, 2015

The US District Court for the Northern District of Mississippi saw grounds for the RN's case.

Whenever an employee in the protected forty-to-seventy year age bracket, who is meeting the employer's legitimate expectations, is replaced with a younger person, there is a *prima facie* case of age discrimination. That is, the employer has to prove there was no discrimination.

The employer's cost-saving rationale crumbled when the company realized that supervision of its non-licensed staff and the LPN herself by law had to come from an RN. The company had to retain two outside part-time RN consultants at a cost that nearly cancelled out the alleged cost savings from eliminating the in-house RN.

An offhand remark also came to light by a company executive expressly saying that another nurse, sixty-one years old, needed to be replaced by someone younger, which corroborated the RN's case against her former employer. ***Ford v. Mississippi Methodist***, 2015 WL 4626467 (N.D. Miss., August 10, 2015).

Reasonable Accommodation: Nurse Must Participate In The Process.

A nurse with twenty years experience in the hospital's behavior health unit started using a cane after hip surgery.

Her physician confirmed her need to use the cane while on the job. That led to a decision by her supervisors that she could no longer work on the behavioral health unit, due to the hazard the cane posed to patients, other staff and the nurse herself.

She was given thirty days to find another position or face termination.

She basically dropped out of the process of applying for other positions in the hospital system because she felt her nursing skills for clinical areas outside behavioral health had lapsed due to non-use.

The employer must initiate an interactive communication process with a disabled employee to determine if a reasonable accommodation can be provided.

In practical terms that meant advising the nurse how to apply for open positions available within the hospital's health system.

UNITED STATES DISTRICT COURT
FLORIDA
August 12, 2015

The US District Court for the Middle District of Florida declined to award compensation to the nurse for disability discrimination.

She herself was responsible for the breakdown of the interactive communication process initiated by her employer.

The hospital was not required to create a new position for her or to give her a competitive advantage over other applicants.

The Court ordered both sides to sit down and see if another position was available for her. ***EEOC v. St. Joseph's***, 2015 WL 4577567 (M.D. Fla., August 12, 2015).